

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (the "Agreement") is made and effective as of this 18th day of January, 2007~~8~~ (the "Effective Date") by and between the State of Arizona ("Arizona"), and Achieve, Inc. ("Achieve").

Arizona is participating with other States (collectively the "States") in the American Diploma Project ("ADP"), which Achieve coordinates. As part of the ADP project, the States and Achieve are working together in a multi-state cooperative procurement of a common End-of-Course Exam for Algebra II ("Exam"). The States have asked that Achieve support this undertaking by acting as a neutral intermediary in connection with the analysis and reporting of exam results from the multiple jurisdictions, in addition to providing coordination and advisory services in connection with development of the exam and selection of the exam contractor. Achieve will also support the implementation and use of the Exam to improve secondary mathematics instruction and preparation for postsecondary education and work, and will convene states, at Achieve's expense, to address issues of mutual concern and importance. This Agreement sets forth the Parties' mutual obligations and understandings regarding Achieve's role and responsibilities in connection with this undertaking.

1. Achieve's Role.

- 1.1.** Achieve shall provide consulting, management and advisory services to the States in connection with the procurement and administration of the contract for the Exam, and the reporting of Exam results. As the States and Achieve may agree, the services performed by Achieve may include, without limitation:
 - A. Serving as the Administrator of the Coordination and Direction Team ("CDT"), which the States intend to establish to manage the procurement and resulting contract;
 - B. Assisting the CDT and the Lead State conducting the Exam procurement (currently the State of Ohio) in the performance of their duties and responsibilities;
 - C. Prior to contract award, serving as a technical advisor to the CDT, the States, and the Lead State regarding all aspects of the Exam procurement, including without limitation the contents of the procurement's request for proposal ("RFP"), the evaluation of proposals, and the source selection decision;
 - D. After contract award, serving as a technical advisor to the CDT, the States, and the Lead State regarding the performance and administration of the Exam contract, including without limitation the following:
 - i. Identifying issues to be addressed during the test development process;

- ii. Communicate and work directly with the Exam contractor as may be directed or necessary to support and coordinate contract administration;
- iii. Advise the States regarding the most effective use of the Exam for the shared purposes, such as improving curriculum and instruction, postsecondary placement, and comparisons across states, as well as state-specific purposes, such as high school graduation;
- iv. Periodically convene K-12 and postsecondary officials in participating States to discuss sharing challenges, lessons learned, and strategies regarding the Exam;
- v. Support an advisory committee regarding the Exam and strategies to broaden the legitimacy of, and support for, and use of the Exam;

- E. Producing and releasing a cross-state report of Exam results in coordination with the release of State-specific results and in consultation with the States;
- F. Publicizing and promoting the Exam to other states and encouraging other states to become parties to the multi-state contract for the Exam and this Agreement; and
- G. Such other activities as the States or the CDT may request, and which Achieve may accept, consistent with the spirit and scope of this Agreement.

- 2. **License.** In order for Achieve to fulfill the States' request that it perform a neutral analysis and reporting of results across the states administering the Exam, Arizona hereby grants to Achieve a non-royalty bearing, non-exclusive, irrevocable, world-wide license in the following data from the Exam results:

2.1. With respect to all students taking the Exam:

- A. Number of students in Arizona who participated in the Exam;
- B. Number and percentage of participating students in Arizona who scored at each of the ADP achievement levels;
- C. Number and percentage of participating students in Arizona who scored at each achievement level, disaggregated by the demographic categories stipulated under the "No Child Left Behind" Act;
- D. The post-secondary plans of each participating student (e.g., enroll immediately in science/math major in 4-year college; enroll in 4-year college non-science/math major; enroll in 2-year college; enroll in post-

secondary vocational program, do not enroll in post-secondary education);
and

E. Other data mutually agreed upon by Arizona and Achieve.

2.2. With respect to a focal group of students taking the Exam in spring, grade 11, the same information as for 2.1 above.

2.3. Either directly or by direction to the Exam contractor, Arizona will provide this information to Achieve pursuant to an agreed upon schedule and format. Achieve will compile this information to provide cross-state summaries and an annual interpretive statement. As multiple years' data become available, Achieve will include trend data in its summaries and interpretations.

2.4. The license granted by Arizona to Achieve in this data shall include the right to reproduce, prepare derivative works, distribute copies to the public, and display such data publicly and comparatively, by or on behalf of Achieve.

3. **Termination.** This Agreement and all rights, duties, and obligations provided for herein shall automatically terminate without any further action of either Party upon the earliest occurrence of any of the following:

3.1. Upon thirty days notice from Achieve to Arizona;

3.2. Upon thirty days notice from Arizona to Achieve; and

3.3. Upon written agreement of all Parties to terminate this Agreement.

4. **Disclaimer of Warranties; Limitation of Liability.**

4.1. Achieve does not make, and hereby expressly disclaims, any representations or warranties, whether express or implied, and whether arising by law, custom, prior oral or written statements or otherwise, including warranties of merchantability, fitness for a particular purpose, non-infringement, title and any and all warranties hereinafter arising from a course of dealing, usage or trade practice. Without limiting the foregoing, Achieve expressly disclaims any warranty that the performance of its obligations hereunder will be uninterrupted or error-free.

4.2. In no event will the Achieve be liable to Arizona for any indirect, consequential, incidental, punitive, special or exemplary damages, or any lost profits or opportunities arising out of or in connection with the breach of any express or implied warranty or otherwise in connection with or arising out of the performance of Achieve's obligations or commitments under this Agreement.


4.3. Achieve is not responsible for the development, production, procurement, contents, implementation of the Exam or the multi-state RFP, or for the disclosure or reporting of test results and data, and Achieve shall bear no liability for any use or dissemination of the Exam, RFP or test data.

5. General Provisions.

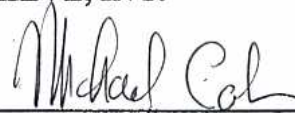
- 5.1. Nature of Relationship.** This Agreement is not intended to establish any partnership, joint venture, employment, agency or franchise relationship between or among the Parties. Except as otherwise expressly provided in this Agreement, no Party will have the power to bind or incur obligations on behalf of any other Party without such Party's prior written consent.
- 5.2. Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Execution may be effected by delivery of facsimiles of signature pages.
- 5.3.** The parties understand that Arizona law makes the provisions in Attachment 1 hereto mandatory for contractors doing business with Arizona, and consequently agree that these provisions will be included in any contract entered into pursuant to this agreement which procures materials or services for, and is funded by, the State of Arizona.

IN WITNESS WHEREOF, the Parties have executed this Agreement, intending it to have the effect of a sealed instrument, as of the day, month and year first above written.

STATE OF ARIZONA

By: 
Name: Douglas C. Peoples
Title: AD Chief Procurement Officer
Date: 1-18-08

ACHIEVE, INC.

By: 
Name: Michael Cohen
Title: President
Date: 1/23/08

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ARIZONA PROVISIONS

AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR: Funds may not presently be available for performance under this Agreement beyond the current fiscal year. No legal liability on the part of the State of Arizona for any payment may arise under this Agreement beyond the current fiscal year until funds are made available for performance of this Agreement. The State of Arizona shall make reasonable efforts to secure such funds.

CANCELLATION FOR CONFLICT OF INTEREST: Pursuant to Arizona Revised Statute section 38-511, the State of Arizona may cancel this Agreement within three (3) years after Agreement execution without penalty or further obligation if any person significantly involved in initiating, negotiating, securing, drafting or creating the Agreement on behalf of the State of Arizona is or becomes at any time while the Agreement or an extension of the Agreement is in effect an employee of or a consultant to any other party to this Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when the Contractor receives written notice of the cancellation unless the notice specifies a later time. If the Contractor is a political subdivision of the State, it may also cancel this Agreement as provided in A.R.S. section 38-511.

NON-DISCRIMINATION: The Contractor shall comply with Arizona State Executive Order No. 99-4 and all other applicable Federal and State laws, rules and regulations, including the Americans with Disabilities Act.

RECORDS: Under Arizona Revised Statute sections 35-214 and 35-215, the Contractor shall retain and shall contractually require each subcontractor to retain all data and other records ("records") relating to the acquisition and performance of the Agreement for a period of five years after the completion of the Agreement. All records shall be subject to inspection and audit by the State of Arizona at reasonable times. Upon request, the Contractor shall produce a legible copy of any or all such records.

THIRD PARTY ANTITRUST VIOLATIONS: The Contractor assigns to the State any claim for overcharges resulting from antitrust violations to the extent that those violations concern materials or services supplied by third parties to the Contractor, toward fulfillment of this Contract.

ATTACHMENT 1